

State/Tribal Assumption of the CWA §404 Program

Basic Presentation

Overview

- **EPA's role in CWA 404 Assumption**
- **Authority for state**
- **State/Tribal requirements for assumption of CWA §404 program**
- **Assumption approval process**
- **Permit process once program approved**
- **EPA oversight of assumed programs**

* For this briefing, state refers to state or tribe

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EPA's Role in Assumption

- **Prior to assumption**
 - Work with states to enhance capacity/capability and develop programs
 - Wetland Program Development Grants
- **Evaluate and approve/disapprove state assumption request**
- **Oversight of assumed program**
 - Coordinate federal oversight of permits
 - Review of modifications of state program
 - Withdraw program approval, if needed

Assumption Authority

- **CWA §404(g)**
 - States may assume administration of the permit and enforcement program for certain waters
- **CWA §404(h) and 40 CFR part 233**
 - Lists state requirements
 - Lists EPA responsibilities: approval and oversight of assumed program
 - Requirements for review and modification of state program as necessary
- **The RA approves program assumption with HQ concurrence**

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State requirements: Part 233 subpart A (233.1 – 233.4), subpart B (233.11- 233.14)

Program approval: Subpart B (233.10, 233.15)

Revisions to state programs: 233.16

Program operation: Subpart D (233.30)

Federal oversight: subpart F (233.50-233.53)

RA approval w/ concurrence- delegation manual cpt. 2, 2-43

Requirements for Assumption of CWA §404 Program

Statutory and Regulatory Requirements

Requirements for Assumption

- **A state program must be:**
 - consistent with and
 - no less stringent than the federal program
- **The state program must have:**
 - Equivalent scope of jurisdiction
 - Activities regulated \geq federal program
 - Public participation
 - Consistency with the 404(b)(1) Guidelines
 - Adequate enforcement authority

Complete Assumption Application

- Shall Include:
 - Letter from Governor
 - Complete program description
 - Attorney General's statement
 - MOA with EPA Regional Administrator
 - MOA with Secretary of Army (through Chief USACE)
 - All applicable state statutes and regulations administering the program

Complete Assumption Application

Program Description Includes:

- **Scope and structure of program**
 - ◆ Jurisdiction
 - ◆ Activities regulated
 - ◆ Anticipated coordination
 - ◆ Permit review criteria
 - ◆ Scope of permit exemptions
- **Procedures for permitting, administrative and judicial review**
- **Structure and organization of state agencies responsible for program administration**
- **Funding and staffing levels**

Complete Assumption Application

Program Description cont.

- **Anticipated workload**
- **Copies of permit application forms, permit forms, and reporting forms**
- **Compliance evaluation and enforcement programs**
- **Clarification of waters under state jurisdiction and those under COE jurisdiction**
- **BMP's proposed to satisfy farm, forest, and temporary mining roads exemption provisions**

Complete Assumption Application

Attorney General's Statement Includes:

- **Citations of specific statutes, administrative regulations and judicial reviews demonstrating adequate authority**
- **Legal analysis of the effect of state laws regarding private property takings**
- **Certification of the authority of each state agency to administer the program**
- **Analysis of authority over Indian lands**
 - ◆ Not assuming authority over Indian lands does not constitute partial assumption

Complete Assumption Application

MOA with EPA Regional Administrator Includes:

- **Classes and categories of permits for which EPA waives federal review**
- **Provisions for state reporting on program implementation**
- **EPA and state roles and coordination regarding:**
 - ✦ Compliance monitoring
 - ✦ Enforcement
- **Provisions for modification of the MOA**
 - ✦ Including transfer or withdrawal

Complete Assumption Application

MOA with USACE Includes:

- **Description of waters of the U.S. over which COE retains jurisdiction including:**
 - ◆ Tidal waters and their adjacent wetlands
 - ◆ Waters presently (or with reasonable improvements) used to transport interstate or foreign commerce and their adjacent wetlands
- **Procedures for transfer of pending permit applications upon program approval**
- **Identification of COE general permits to be assumed by the state**
 - ◆ Including a plan for transferring responsibility

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Navigable waters – defined as those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or including wetlands adjacent thereto.

CWA §404 Program Assumption Approval Process

Statutory and Regulatory Requirements

Part 233 subpart A (233.1 – 233.4), subpart B (233.11- 233.14)

Assumption Approval Process

- **Assumption package submitted to EPA**
 - 30 day EPA review for package completeness
 - Complete – state notified; 120 day statutory clock begins
 - Incomplete - package returned to state; 120 day clock does not begin

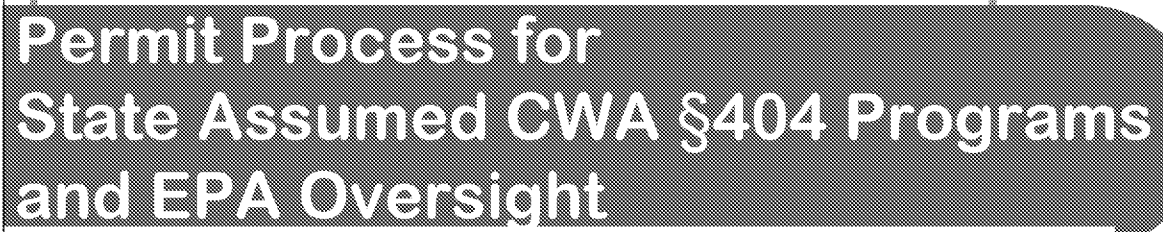
Assumption Approval Process cont.

120 day review period includes:

- State notification package is complete
- Copy sent to COE, FWS and NMFS ≤ 10 days
 - Comments due to EPA within 90 days
- Notice of assumption request published in Federal Register and newspapers (RA)
 - 45 day comment period
 - Public hearing 30+ days after Federal Register notice published

Assumption Approval Process cont.

- **Regional review**
 - ✦ Coordination with HQ
 - ✦ Regional Administrator recommendation
 - ✦ Response to comments in final FR notice
 - ✦ Direct response to COE, USFWS, and NMFS
- **Regional Administrator approves or disapproves assumption request by day 120**
 - ✦ Approval requires HQ concurrence (OW, OGC, OECA)
 - ✦ This time limit may be extended by EPA and the state
- **Upon approval, Regional Administrator notifies the State and publishes notice in the Federal Register**
- **If program is not approved, Regional Administrator notifies the state and lists any revisions that are necessary to obtain approval**



Permit Process for State Assumed CWA §404 Programs and EPA Oversight

Permit Process Once Assumed

- **State transmits, to EPA, notice of every permit application received**
- **EPA reviews permits where federal review is not waived**
- **State shall not issue a permit to which EPA has objected or placed requirements for a permit condition, until EPA's concerns are addressed**

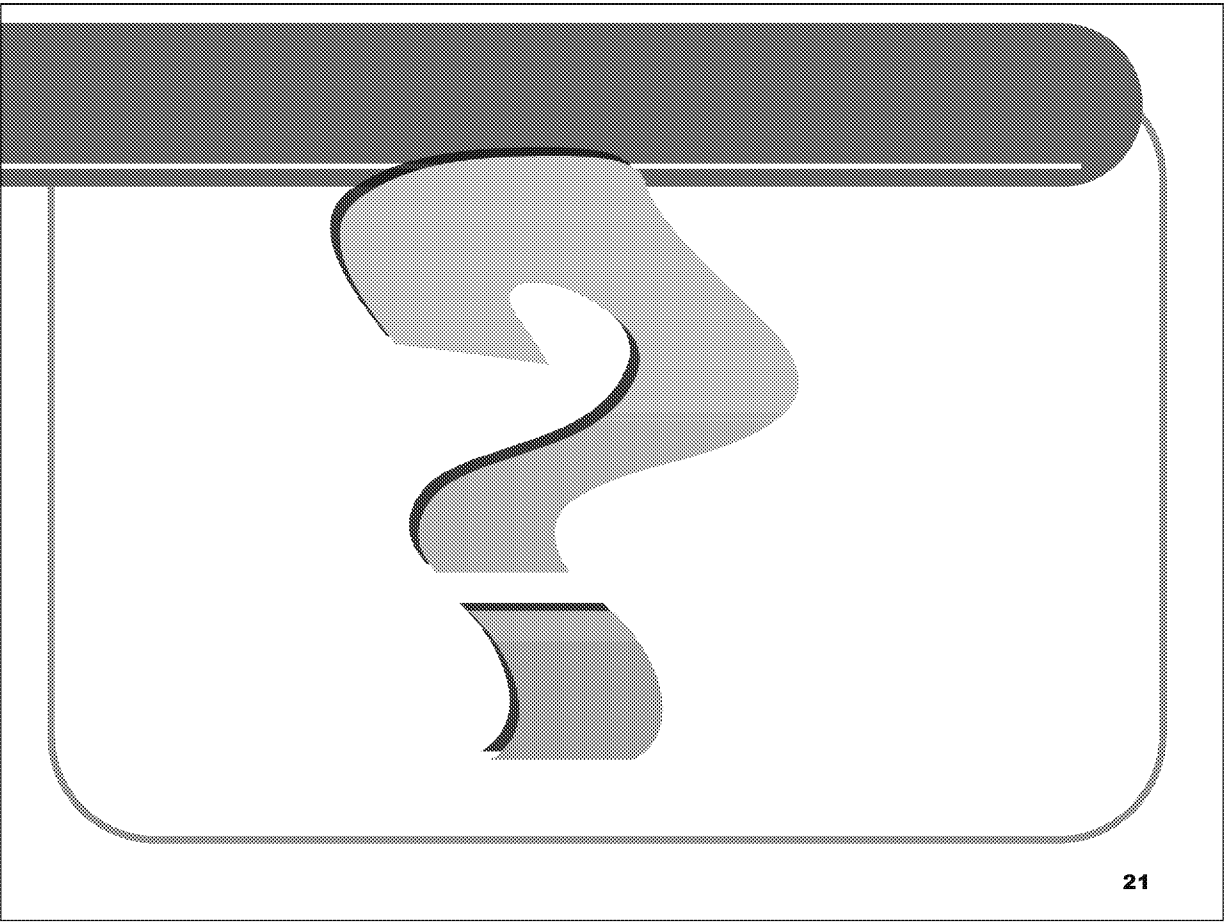
Permit Process Once Assumed cont.

- **Waiver of review:**

- MOA with EPA identifies categories of projects for which EPA review is waived
- EPA can not waive review of:
 - ◆ Draft general permits
 - ◆ Discharges that may impact endangered species
 - ◆ Discharges that may adversely impact waters of another state
 - ◆ Discharges with known or suspected toxic or hazardous pollutants
 - ◆ Discharges proximal to public water supply intakes
 - ◆ Discharges within critical State/Federal areas

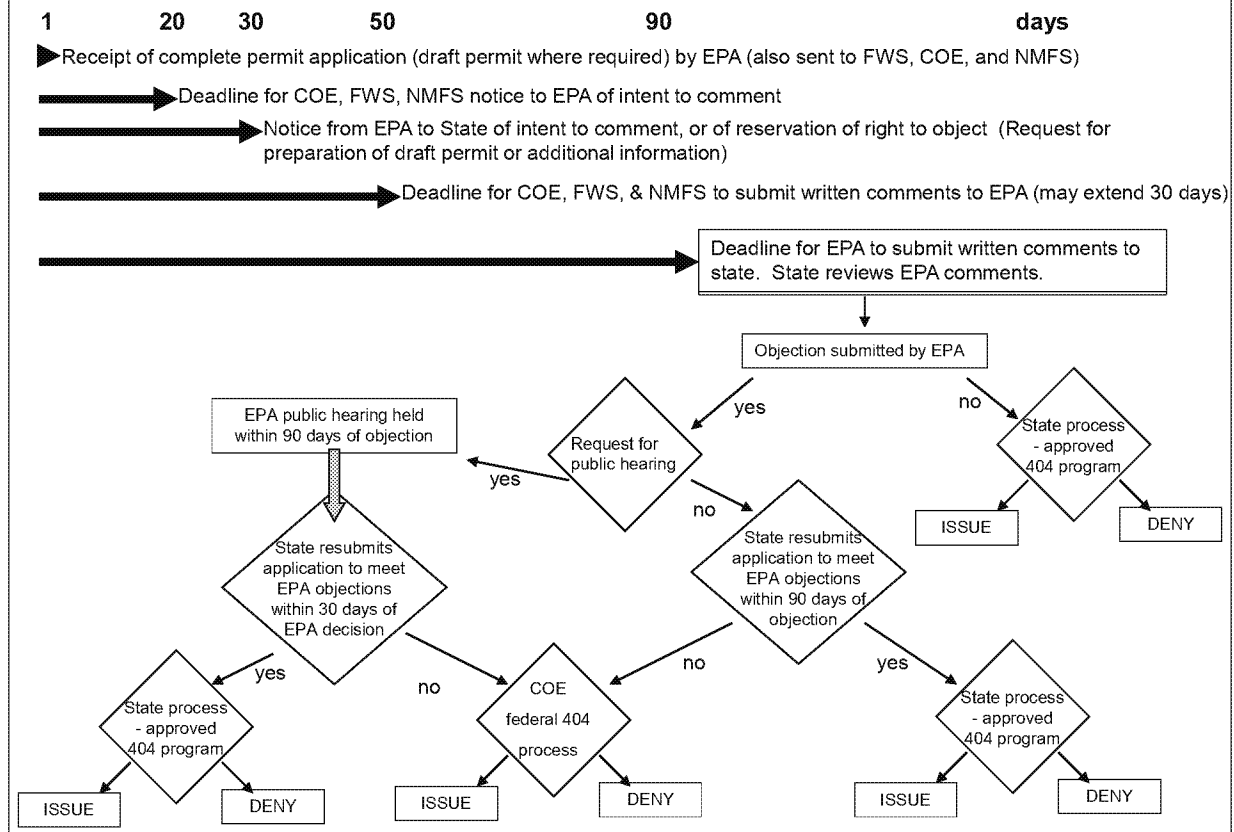
EPA Oversight

- **Review of permits not exempt. EPA may require review of additional categories or all permits e.g.,**
 - ◆ EPA also reviews NJ permits
 - ◆ filling of ≥ 5 acres of freshwater wetlands or state open waters and/or any regulated activity which results in significant reductions in the ecological, commercial, or recreational values of \geq five acres of freshwater wetlands or state open waters
 - ◆ culvert enclosures of more than 100 feet with more than 200 cubic yards of fill
 - ◆ channelization of more than 500 feet of a river or stream
 - ◆ EPA also reviews MI permits
 - ◆ discharges into critical areas
 - ◆ major discharges as defined in the MOA e.g., culverts > 100 feet, wetlands fill >10,000 yds³ of material
- **State program consistency with new requirements**
 - ◆ e.g., Mitigation regulations, Rapanos guidance
- **Program reporting**
 - ◆ State submits draft annual reports:
 - ◆ Draft annual report made available for public review
- **Program Review and Evaluation**



Appendix

Flow Chart of State Permit Process Review



Microsoft Excel - assumption3.xls							
File Edit View Insert Format Tools Data Window Help Adobe PDF							
Arial 10 B I U [Text Alignment] [Number] [Date/Time] [Style] [Font Color] [Background Color]							
A2 = 1							
1	2	3	4	5			
		A	B	C	D	E	G
1			Requirement	CWA Section/CFR	Guidance/Court Decisions	State Statute	State Regulation
6	d		Permits issued apply and assure compliance with, any applicable requirements of this section including, but not limited to: §404(b)(1) guidelines, §307, and §403 of this title.	40 CFR 233.20(a) 33 CFR 320.4			
7	e		Compliance with §404(b)(1) guidelines	40 CFR 230.10, CWA §404(b)(1) 33 CFR 320.4(b)(4)	CWA §404(b)(1) Guidelines		
33	f		Compliance with §307, Toxic Pollutant list				
34	g		Compliance with §403, Ocean Discharges	40 CFR 125.120-125.124. 33 USC § 1343	1) EPA developed the Ocean Discharge Guidelines (40 CFR Part 125, Subpart M [45 FR 65942, October 3, 1980] 2) Framework for Ecological Risk Assessment (1992) 3) CWA Section 403: Procedural and Monitoring Guidance (EPA 842-B-94-003)		
37	h		Adequate enforcement authority	40 CFR 123.27 CWA §308 33 CFR 326	for monitoring and enforcement		
38			Complete Package Requesting Approval of CWA §404 Program Assumption				

Staff Draft